

EMPLOYMENT

Section 1. Termination Cases

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A. Legal Standards for Termination Cases

1. The Scope of This Section

This section discusses a major category of employment complaints under the FEHA - "standard" termination cases. These are cases in which the complainant claims that the respondent forcibly ejected him or her from some employment position, and that the respondent did this because of the complainant's protected status (national origin, sex, etc.).

- Usually termination cases involve just that; the respondent fires the complainant. But the same basic analysis applies to other kinds of "forcible ejection," such as demotion, layoff, forced transfer, removal from a training program leading to employment, and so on.
- In some cases involving layoffs, the choice of who to layoff and who to retain is analytically similar to the choice of who to select for a certain position. Therefore, you may find it more useful to use the analysis in Selection (Section 2 of Chapter VII) for such cases. Other layoff cases are analytically similar to "standard" termination cases.
- Standard termination cases focus mainly on Issue II. The respondent defends by claiming that the termination was not discriminatory to begin with, rather than by asserting some affirmative defense. Some types of cases that focus mainly on Issue III (e.g., physical handicap cases, sex cases involving BFOQ's) might involve terminations. Because the affirmative defenses in these cases raise unique problems, the cases are dealt with in other sections (see Sections 9, 11, and 12 of Chapter VII).
- In standard termination cases, the key question under Issue II is whether there was a "causal link" between the termination and the complainant's race, sex, etc. Other kinds of prohibited action under Issue II (e.g., "adverse impact" or "failure to accommodate" religious beliefs) can also involve termination, but these cases are discussed in separate sections (see Sections 8 and 15 of Chapter VII).
- Many retaliation cases involve terminations, but the special problems of retaliation are discussed in Section 4 of Chapter VII.
- A few termination cases involve "constructive discharge" - situations in which the complainant is not forcibly ejected, but instead resigns because some discriminatory act made his or her working conditions intolerable. This special kind of termination case is discussed in Section 3 of Chapter VII.

Because standard termination cases focus on Issue II, this section will discuss the applicable legal standards and analysis only for Issue II.

2. The Legal Standard

Standard termination cases use the same basic legal standard as most cases under Issue II. If the complainant falls within a group protected by the FEHA, discrimination is shown if:

- a. The respondent took some "adverse action" (in this case termination) against the complainant; and
- b. A "causal connection" exists between the complainant's protected status and the adverse action.

3. Discussion of the Legal Standard

The key to this standard, obviously, is the "causal connection." If the complainant's protected status was "a factor" in (was part of the respondent's conscious motivation for) the decision to terminate the complainant, the requisite causal connection exists, and we say that the adverse action was taken "because of" the complainant's protected status. This is the sense in which the respondent's conduct must be "intentional."

The complainant's protected status need not be the sole reason for the respondent's actions. Even if other, non-discriminatory factors also entered into the respondent's decision, the legal standard is still met as long as the complainant's protected status was at least one of the factors influencing the decision.

Remember, however, that the presence of these other, non-discriminatory reasons for the respondent's conduct might limit the remedy that can be obtained for the respondent's discriminatory conduct. If the complainant's protected status was a factor in his or her termination, the respondent loses Issue II and, if no affirmative defense exists, a violation of the FEHA is established. The respondent still has the opportunity under Issue IV, however, to show that one or more of the other, non-discriminatory factors would still have led it to terminate the complainant, even if no discriminatory motive had been present. If this showing is made, the complainant may not be entitled to back pay and benefits or reinstatement. If a case involves multiple causal factors of this kind, be sure to analyze this problem under Issue IV (see Section 16 of Chapter VII).

B. Analysis of Termination Cases

Although the "causal connection" legal standard is quite simple, the evidence relevant to this standard is often more complex. Respondents rarely admit that they were motivated by the race, national origin, etc. of the complainant unless they feel that an affirmative defense will excuse it. In standard termination cases, however, respondents almost never rely on an affirmative defense, but claim instead that they did not discriminate to begin with. Thus, "direct" evidence of a causal connection (e.g., a supervisor stating that he fired the complainant because of her sex, race, etc.) is usually not found in standard termination cases.

Because of this, and because of the nature of these cases, the Commission will look to many other kinds of "indirect" evidence to determine whether the complainant's protected status was a motivating factor in his or her termination. The variety of these kinds of evidence and the differences in the logical routes by which they bear on Issue II require that we use relevant questions to help organize and assess these segments of evidence.

The analytical outline below contains suggested relevant questions for the most typical kinds of evidence that appear in standard termination cases. Remember to use these questions only as the starting point for your own analysis. Each case is different and may well involve only some of the questions below, or may require modifications or different questions altogether.

1. Analytical Outline

II. Discrimination

Was the complainant terminated by the respondent because of the complainant's protected status (race, sex, etc.)?

Relevant Questions:

- A. Did the adverse action (the termination) actually happen?
- B. Is the respondent's reason for the termination factually accurate?
- C. Does the respondent's treatment (in terms of termination) of similarly situated persons indicate that the termination occurred because of the complainant's protected status?
- D. Does the respondent's application of the pre-termination procedures to similarly situated persons indicate that the termination occurred because of the complainant's protected status?
- E. Does the manner in which the complainant was replaced indicate that the termination occurred because of the complainant's protected status?
- F. Does the relevant statistical pattern indicate that the termination occurred because of the complainant's protected status?
- G. Is there any direct evidence to link the termination to the complainant's protected status?
- H. Is there any anecdotal evidence to link the termination to the complainant's protected status?
- I. Other relevant questions?

2. Explanation of Analytical Outline

II. Discrimination

Was the complainant terminated by the respondent because of the complainant's protected status (race, sex, etc.)?

The legal standard for Issue II in termination cases asks whether there is a causal link or connection between the complainant's protected status and the adverse action. The Issue question above, then, states Issue II in terms of the legal standard by asking whether the adverse action occurred because of the complainant's protected status. The respondent almost always denies the existence of this causal connection, and most of the relevant questions for this Issue question therefore focus on this disputed aspect of the case.

NOTE: If the complainant's protected status was a factor in the respondent's action (that is, even if it was only one of several factors influencing the respondent) this will be sufficient to establish the requisite causal connection.

Relevant Questions:

A. Did the adverse action (the termination) actually happen?

While the key to Issue II in standard termination cases is the causal connection between the complainant's protected status and the termination, there must of course have been a termination to begin with.¹ This is usually not disputed; however, in a few cases, there may actually have been no termination, so the outline starts with a relevant question addressed to this part of the legal standard. Two kinds of cases may raise this problem:

1. In constructive discharge cases, the respondent never actually fires the complainant. The complainant claims instead that some other discriminatory actions by the respondent made working conditions there so intolerable that the complainant was forced to resign. If the evidence shows that no termination occurred but that a constructive discharge might have, analyze the case as discussed in Section 3 of Chapter VII.
2. In other cases, there is simply confusion about whether the complainant was actually terminated. For example, the complainant may have thought he was fired when he really had not been, and then left work. The respondent might then have assumed that she quit and removed her from the payroll. If it

¹In a few cases, the respondent may claim that the characteristic, or "status," of the complainant that is claimed to have caused the termination does not qualify as "protected status" under the FEHA. For example, a respondent may claim that a complainant's moral beliefs do not qualify as "religion," or that a complainant's physical condition does not qualify as a "physical handicap." Because these are essentially claims that the complaint is not covered by the FEHA, they should be analyzed as jurisdictional disputes under Issue I. See, for example, Section 17 of Chapter VII.

is clear that the respondent did nothing to induce this confusion, there has been no termination.

If the evidence shows clearly that there has been no termination and the case cannot be analyzed as a constructive discharge case, the legal standard for Issue II cannot be met, and there is no need to go on to the remaining relevant questions.

B. Is the respondent's reason for the termination factually accurate?

If it is clear that a termination did occur, we can move on to evidence showing that there was (or was not) a causal connection between the complainant's protected status and the termination. All the remaining relevant questions in this outline address this part of the legal standard.

In nearly every standard termination case, the respondent will reply to the complainant's claim that she was terminated "because of" her protected status with one or more "rebuttals." Each rebuttal is a claim that some legitimate factor other than the complainant's protected status (a "non-discriminatory" reason) was so clearly the real motivation for the termination as to negate any inference that the protected status played any role at all in the decision to terminate.

The respondent's rebuttals are usually the core of its argument on Issue II. If the evidence strongly supports one or more of the rebuttals, the Commission is likely to infer that these factors, and not the complainant's protected status, were the true causes of the termination. But if the evidence does not clearly support the rebuttals offered by the respondent, the Commission will not search on its own for still other non-discriminatory explanations; it will infer instead that the complainant's protected status was at least one of the factors motivating the termination.

Thus, the viability of the rebuttals offered by the respondent is very important to the analysis of Issue II. The next several relevant questions in the outline are designed to test the viability of these rebuttals.

Relevant question B asks, first, whether the rebuttal is in fact true. We naturally assume that respondents base their decisions on circumstances that actually exist. If a respondent claims to have based its termination decision on factors that turn out not to have existed, the Commission will usually infer that the respondent did not rely on these factors.

Example 1:

Respondent claims that it terminated Complainant because he was caught sleeping on the job, in violation of Respondent's rules, not because he is Black. If the evidence shows that Complainant was never sleeping on the job, the Commission will be likely to infer that Respondent did not fire Complainant for this reason.

Example 2:

Respondent claims that it laid off Complainant because of a staff reduction caused by the loss of several government contracts, not because of her ancestry. If the evidence shows that the loss of the contracts did not occur, or that the loss did not affect the staff in Complainant's department at all, the Commission will be likely to infer that Complainant was not laid off because of the loss of government contracts.

Be sure to check the factual accuracy of each element of a respondent's rebuttal. If a respondent claims, for example, that it fired the complainant for violating a specific respondent policy, you should check 1) whether the policy in fact existed, 2) whether the written policy was actually applied in practice, and 3) whether the complainant really violated the policy, as applied.

If any one of these elements is not factually correct, the viability of the entire rebuttal is undermined.

Beware of a trap under relevant question B. In some cases, the factual inaccuracy of the respondent's rebuttal will not undermine the rebuttal. If the evidence shows that the respondent believed in good faith that certain circumstances existed at the time it terminated the complainant, the rebuttal still stands, even though the evidence also shows that the circumstances did not in fact exist. Remember that the legal standard asks what actually motivated the respondent. If the evidence shows that the respondent was in good faith, its mistaken belief is as plausible a non-discriminatory motive as a factor that really existed.

Example:

In Example 1 above, the evidence shows that Complainant never slept on the job but that Complainant's supervisor had reason to believe that he had. The Commission is likely to infer that Respondent's mistaken (but honest) belief that Complainant had slept on the job is a legitimate non-discriminatory reason, on which Respondent relied to terminate Complainant. Even though Respondent's rebuttal is not factually accurate, then, it is still viable.

- C. Does the respondent's treatment (in terms of termination) of similarly situated persons indicate that the termination occurred because of the complainant's protected status?

We can also test the viability of the respondent's rebuttal by another route, no matter what the evidence under relevant question B shows. Even if the non-discriminatory factor on which the respondent bases its rebuttal is factually accurate (or if the respondent genuinely believed this), other evidence might still show that this factor was not the real cause of the complainant's termination.

We generally expect that a respondent's managers and supervisors will make uniform and consistent decisions. If the circumstances that the respondent claims led it to fire the complainant also applied to other employees, then, we expect that the respondent will also terminate them. If these others are not terminated,

however, the Commission will doubt whether the respondent actually terminated the complainant for the claimed reason, and the Commission will look to differences in the race, sex, etc., of the complainant and those not terminated to explain the difference in treatment.

Example:

In Example 1 above, the evidence under relevant question B shows that Complainant was in fact sleeping on the job. The evidence under relevant question C, however, shows that four white employees had also been caught sleeping on the job but had not been fired for it. Even though the evidence that Complainant was sleeping on the job suggested that this was the reason he was fired, the evidence that Respondent did not give similarly situated Whites the same treatment suggests even more strongly that sleeping on the job was not the real reason for Complainant's termination, and that his race was.

This kind of evidence (usually called "disparate treatment" or "comparative" evidence) is often the most powerful evidence in standard termination cases. Analyze this evidence in the following steps, paying constant attention to its underlying logic:

1. Determine who is similarly situated to the complainant.

This is the most important step. We say that other persons are "similarly situated" to the complainant if they are sufficiently like the complainant to warrant the key assumption that the respondent will treat them equally. If the persons to whom the complainant is being compared are not similarly situated, this assumption cannot be made and no inference of bias (or the lack of it) can possibly be drawn from the comparison. Thus, this step must be done first. If we find that no one is similarly situated to the complainant, there is no need to do more under this relevant question.

What exactly makes another employee similarly situated to a complainant depends heavily on the particular facts of each case. Examine the case carefully to determine which characteristics other persons must share with the complainant in order for us to expect the respondent to treat them equally. Always look for at least two essential characteristics:

a. The persons being compared to the complainant should be under the same decision-maker who terminated the complainant.

When the Issue question asks whether the complainant's protected status was a factor motivating the respondent to terminate the complainant, it is really asking whether the particular managers or supervisors who actually made the decision to terminate the complainant were so motivated. If these "decision-makers" had the requisite "intent," the law attributes it to the respondent as a whole.

If the other employees to whom we try to compare the complainant were under the authority of a supervisor (or other decision-maker) other than the complainant's, it will usually be very difficult to infer bias in the complainant's supervisor from the fact that the other employees were not terminated by their supervisor. In such situations, we cannot rely on the critical assumption that one decision-maker will treat all persons equally, since no single decision-maker had authority over both the complainant and the other employees. Thus, the other employees are not similarly situated. Only those employees subject to the same decision-maker as the complainant are similarly situated.

Be careful when you apply this rule, however. Look closely at who actually fired the complainant. You may find that a third manager or supervisor has control over both the complainant's supervisor and the supervisor of the other employees, and reviews all termination decisions. In that situation, the other employees would fall within the scope of authority of a single decision-maker who was responsible for terminating the complainant, and thus they would be similarly situated.

- b. The respondent's rebuttal should also apply to the persons being compared to the complainant.

Obviously, the circumstances that the respondent claims led it to fire the complainant must also apply to those to whom the complainant is to be compared. If the respondent says the complainant was excessively absent, look for others who were similarly absent. If the respondent says budget reductions required that the complainant be laid off, look for other employees subject to the same reductions.

When you are looking for other persons to whom the rebuttal applies, be careful not to narrow this group too much. The respondent may cast its rebuttal in very precise terms. If you look only for others to whom this precise rebuttal applies, you may find no one. But a somewhat broader view of the rebuttal may widen the group of persons who are similarly situated.

Example:

Respondent claims that it fired Complainant immediately after "he broke Company Rule No. 30.16(a), prohibiting unauthorized absence during a holiday overtime shift." You can find no one else who ever broke this particular rule. But Respondent's Rule Manual indicates that Respondent considers infractions of ten other rules to be at least as serious as breaking rule No. 30.16(a) and to warrant immediate termination. Because of this, we can assume that a person who broke any one of those other rules would be treated the same as someone who broke Rule No. 30.16(a), or perhaps even more harshly. Thus, we can

consider anyone who broke one of these other rules to be similarly situated to Complainant. In effect, we are taking a somewhat wider view of Respondent's rebuttal: "Complainant was fired because he broke one of eleven rules requiring immediate termination."

The more widely you cast your net in this way, the more tenuous becomes the critical assumption of equal treatment, and the more voluminous the data you must handle. Strike a reasonable balance by trying to find just enough similarly situated persons to give you a reasonable test of the viability of the rebuttal.

Remember to look for other elements of similarity of situation beyond the two described above. For example, the time frame of your comparison may be important. If the only other employees who committed the same infraction did so ten or more years earlier, they may not be sufficiently similarly situated to support an inference of bias. Also, there may be other non-discriminatory reasons for the difference in treatment beyond what the respondent has asserted. Anticipate these non-discriminatory reasons since they may make the employees you are comparing not similarly situated.

Example:

In its first written response to the complaint, Respondent claims that it fired Complainant because she was excessively absent. In your effort to find those people who are similarly situated to the Complainant, you look for others to whom this rebuttal applies, as described above, and you find several other employees who were excessively absent. In later contact with the Complainant, she mentions she also broke several of Respondent's office machines and was reprimanded for doing so. The repair cost \$900. Even though the Respondent has not yet asserted these instances of poor work performance, you anticipate that the Respondent may later assert these as reasons for its termination of the Complainant independent of her absenteeism. Therefore, in looking for the similarly situated group, you also search for people with similar work performance.

2. Determine who was terminated and who was not.

After you have determined who is similarly situated to the complainant, you can then ask whether these persons were treated differently. The kind of "treatment" we are concerned with under this relevant question is the respondent's decision whether to terminate or not (other kinds of treatment are discussed below, under relevant questions D and I).

This information, coupled with information on whether the similarly situated persons share the complainant's protected status, will tell us if we can infer that the complainant's termination was biased or not. The nature and strength of

this inference depends on the particular facts of each case, but some general rules usually apply:²

a. Complainant is Black/similarly situated persons are White:

If the complainant was terminated, but none of those similarly situated were terminated, a strong inference can be drawn that the complainant's race caused his or her firing.

If the complainant and all those similarly situated were terminated, a strong inference can be drawn that race was not a causal factor in the complainant's firing.

b. Complainant is Black/some similarly situated persons are Black and some are White:

If all Blacks are terminated and all Whites are not, a very strong inference of bias in the complainant's firing can be drawn.

If some Blacks and Whites from the similarly situated group were terminated and some were not, the inference to be drawn will depend on the exact composition of the terminated and not-terminated groups. If most of those terminated were Black and most of those not terminated were White, an inference of bias might be drawn. But if the groups are more evenly composed, or if most of those terminated were white, no inference of bias could be drawn.

c. Complainant is Black/all similarly situated persons are Black:

If the complainant and all others are terminated, an inference of bias might be drawn, but the absence of any Whites to compare to will make the inference weak at best. You should check why the rebuttal applies only to Blacks, however.)

If some of those similarly situated were terminated and some were not, the evidence does suggest that the respondent's claimed rebuttal factor was not really applied to the complainant (because it was not uniformly applied), but the absence of a comparison to Whites means that no strong inference of race bias can be drawn.

²These rules use race to illustrate the role of protected status in determining bias, but the same inferences can be drawn for any protected status.

Summary of
Analysis under Relevant Question C

1. Determine who is similarly situated to the complainant.
 - a. Find out which supervisors or managers actually terminated the complainant and identify the groups of employees within the scope of their authority.
 - b. From that group pick out those to whom the respondent's rebuttal also applies. (Remember to take a broad view of the respondent's rebuttal and look for others whose conduct also warrants termination under the respondent's policy, even if their circumstances are not precisely the same as the complainant's.)
 - c. Decide whether there are any other characteristics a person must have to be similarly situated in the case and pick out, from the group isolated by steps a. and b., the persons who have these characteristics. (Remember to anticipate all the non-discriminatory reasons that might make the employees you are comparing not similarly situated.)
 2. Determine who was terminated and who was not.
 - a. Find out how the respondent treated each of the similarly situated persons (whether each was terminated or not), and whether each of these persons shares complainant's protected status.
 - b. Decide what inference should be drawn from this evidence on the Issue question - whether the rebuttal was (and therefore the protected status was not) the reason for the complainant's termination.
- D. Does the respondent's application of the pre-termination procedures to similarly situated persons indicate that the termination occurred because of the complainant's protected status?

The basic "disparate treatment" analysis discussed under relevant question C above can also be applied to another aspect of the respondent's "treatment" of the complainant and others; the application of the respondent's pre-termination disciplinary procedures. Many employers have some kind of procedures for taking disciplinary steps short of outright termination (usually a series of progressively more stringent measures) in response to their employees' mistakes, infractions, or poor performance. If the rebuttal in your case involves a claim that the complainant erred somehow (instead of a claim that some "neutral" factor such as a budget cut compelled the termination) and if the respondent has a pre-termination disciplinary procedure, evidence on how the respondent applied this procedure to the complainant and others similarly situated may help indicate whether the complainant's termination was biased. Do not use this relevant question if no pre-termination procedure is involved, however.

Example:

Complainant claims he was terminated because of his Mexican ancestry. Respondent claims that the only reason for his termination was his constant tardiness for work. Respondent's policy on tardiness and absenteeism calls for two warnings, then suspension, then termination if the infractions continue.

Complainant was never given any warnings and was suspended for two days shortly before being terminated. An Anglo co-worker who was similarly tardy was given three warnings and a half-day suspension before he was ultimately fired for tardiness.

Because Respondent applied its pre-termination procedures much more harshly to Complainant than to a similarly situated Anglo, the Commission would infer from this difference in treatment that Complainant's ancestry was a factor influencing his termination.

Remember that the inference to be drawn from such pre-termination differences in treatment is that the termination was caused by the complainant's protected status. Technically, the difference in pre-termination treatment is itself an "adverse action" separate from the termination, but in most cases the remedy for this separate harm is too insignificant to warrant a separate Issue question. Instead, we use the evidence of this pre-termination discrimination (or its absence) to test whether the termination itself was discriminatory.

To analyze this evidence, use the same basic approach that was outlined under relevant question C, above:

1. Determine who is similarly situated to the complainant.
 - a. Find out which supervisors or managers disciplined the complainant and identify the groups of employees within the scope of their disciplinary authority.
 - b. From that group pick out those whose conduct warranted discipline as much as the complainant's. (Remember that the others' conduct need not be identical to the complainant's, as long as it is at least as serious under the respondent's disciplinary policy.)
 - c. Decide whether there are any other characteristics a person must have to be similarly situated in your particular case and pick out, from the group isolated by steps a. and b., the persons who have those characteristics. (Remember to anticipate all the non-discriminatory reasons that might make the employees you are comparing not similarly situated.)

(Be careful not to assume that this group of similarly situated persons is the same as that under relevant question C. They might be somewhat different.)

2. Determine how the similarly situated persons were treated relative to the complainant.

- a. Find out whether or not the respondent applied its pre-termination procedures more favorably to each similarly situated person than to the complainant. Also find out whether or not each similarly situated person shares the complainant's protected status.
- b. Decide what inference to draw from this evidence on the Issue question; whether the complainant's termination was caused by his protected status. The general rules under relevant question C apply to making this inference.

E. Does the manner in which the complainant was replaced indicate that the termination occurred because of the complainant's protected status?

In many standard termination cases, the complainant is replaced with another employee. In some such cases, evidence on the manner of this replacement may help indicate whether or not the complainant's protected status caused his termination. If the complainant was fired for malfeasance of some kind and was then replaced in the ordinary manner by someone who does not share the complainant's protected status, only a very weak inference of bias could be drawn, if any. In certain cases, however, a stronger inference might be drawn.

Example 1:

The evidence shows that Respondent told a White person that they could have the Black Complainant's job, but Respondent did so before Complainant even committed the infractions Respondent claims to have fired her for.

Example 2:

Respondent asserts that the female Complainant's position was eliminated because of the financial need to reduce its workforce, but it nevertheless immediately fills the position with a man.

Example 3:

Respondent terminates a Spanish-surnamed manager and replaces him with an Anglo who is no more qualified than Complainant but receives a salary that is 15 percent higher than Complainant received and that is also equivalent to the salaries of Respondent's other Anglo managers. (See DFEH v. Lucky Stores (1980) FEHC Dec. No. 80-30, page 16.)

Example 4:

Respondent terminates a Black Complainant but soon replaces him with another Black. The nature of the replacement tends to disprove that the Complainant's termination was because of race.

F. Does the relevant statistical pattern indicate that the termination occurred because of the complainant's protected status?

In some standard termination cases, certain statistical patterns may also help demonstrate a causal connection between the complainant's protected status and the termination. This statistical evidence suggests, in various ways, that the respondent is generally biased against persons of the complainant's protected status. The Commission will in turn infer that this general bias infected the respondent's decision to terminate the complainant. This inference, however, is rarely very strong, and it is never sufficient alone to demonstrate the causal connection. Instead, the Commission views statistical patterns as providing a "background" or "context" in which to view other kinds of evidence. (DFEP v. Crown Zellerbach (1979) FEHC Dec. No. 79-12, page 3.)

In general, any statistical pattern that implies general bias of a kind that might have affected the complainant's own termination is relevant. Two types of pattern are particularly likely to be relevant:

1. Relative Termination Rates

The most directly relevant statistics are probably the rates of termination, over the past several years, of the group that shares the complainant's protected status and the group that does not. A sharp difference between these rates in favor of the non-protected status group suggests a general bias in the respondent's termination practices against the protected status group, and thus against the complainant. More equal termination rates suggests the absence of such bias.

Example:

The Black Complainant is terminated from Respondent's Sales Department. Respondent employs 240 people in its Sales and four other departments. Four years ago, this group of 240 was made up of 60 Blacks and 180 non-Blacks.

Over the past four years, Respondent fired 20 Blacks and 30 non-Blacks. The relative termination rates are:

$$\begin{array}{lcl} \text{Blacks:} & \frac{20 \text{ firings}}{60 \text{ total employees}} & \times 100 = 33 \text{ percent} \\ \\ \text{Non-Blacks:} & \frac{30 \text{ firings}}{180 \text{ total employees}} & \times 100 = 16.6 \text{ percent} \end{array}$$

Because the Black termination rate is twice as high as the non-Black rate, an inference of general race bias in terminations, and the further inference that this bias affected Complainant's own termination, is warranted.

In cases where the sample group is sufficiently large, you should calculate similar termination rates for other groups, such as Whites, Hispanics, etc. Then, compare the termination rate of the complainant's group to that of the most advantaged subgroup, usually Whites.

Be careful not to confuse evidence on relative termination rates with the "disparate treatment" evidence under relevant question C above. The group examined under relevant question C consists only of persons who are similarly situated to the complainant. The (usually much larger) group we consider under this relevant question consists of everyone who was terminated, whether they were similarly situated or not.

2. Workforce Statistics

The Commission has also indicated that the relative absence in the respondent's workforce of persons sharing the complainant's protected status may also demonstrate the respondent's general bias against this group, and thus against the complainant. The Commission will compare the percentage of the respondent's workforce (or some relevant portion of it, such as the complainant's department or job classification) that shares the complainant's protected status to the percentage that does not. If the percentage of the complainant's group is small relative to the other group's, the inference of general bias will be drawn.

Example:

Complainant, a woman, is fired from her job as a Department Manager with a chain store. Only 5 out of 250 of the chain's Department managers are women. The general inclination to disfavor women that this pattern suggests will bolster other evidence that Complainant's sex was the cause of her termination. (See DFEH v. Lucky Stores (1980) FEHC Dec. No. 80-30, page 13.)

The Commission has so far looked to workforce evidence of this kind only where the percentage represented by the complainant's group is very small and the complainant is thus virtually alone in the workforce. (See Lucky Stores, page 13 [5 out of 250 (2 percent)]; DFEH v. Hubacher Cadillac/Saab (1981) FEHC Dec. No. 81-01, pages 7, 13, 18 [1 out of 100 (99 percent)]; DFEH v. City of Corcoran Police Department (1980) FEHC Dec. No. 80-31, pages 12-13 [1 out of 12 (8.3 percent)].)

Also, the Commission has not explicitly insisted that the percentage of persons sharing the complainant's protected status in the respondent's workforce be compared to the percentage of such persons in the available labor pool. (See Section 2 of Chapter VII for a discussion of such comparisons.) Nevertheless, workforce statistics are always strengthened if it can be shown that the complainant's group in the labor market is under-represented in the respondent's workforce.

No matter which statistical pattern is used, two factors will influence the strength of the inference drawn from the pattern:

a. Size of the Numbers Involved

In general, the larger the numbers involved in a statistical pattern, the more reliable is the inference drawn from them. The Commission has not applied standard statistical tests to its patterns to determine formally if they are reliable, probably because the Commission does not give primary weight to such evidence to begin with. Thus, even relatively small numbers can be used (e.g., the 1-out-of-12 pattern in City of Corcoran, above), but they will still be weaker than larger numbers would be.

b. Which Supervisors Are Responsible for the Pattern

As we saw in the "similarly situated" discussion under relevant question C, the respondent's motivation that is the focus of Issue II is really the motivation of one or more of the respondent's supervisors or managers. Thus, if we are trying to infer that the general bias revealed by a statistical pattern also affected the complainant's termination in particular, that inference will be much stronger if the person who actually fired the complainant is the same person whose hiring and firing decisions produced the whole statistical pattern. The Commission has not insisted on this, however, in using statistical evidence in its decisions.

G. Is there any direct evidence to link the termination to the complainant's protected status?

In a few cases, the fact that a piece of evidence demonstrates is itself the answer to the Issue question (e.g., a supervisor's statement that "we fired complainant because we didn't want a woman in the job" demonstrates the causal connection directly). Always check for this very powerful evidence, but do not expect to find it very often.

H. Is there any anecdotal evidence to link the termination to the complainant's protected status?

Anecdotal evidence about particular events or conduct (such as racist remarks, harassment of the complainant and others of the same protected group, etc.) may demonstrate that the respondent supervisors or managers who terminated the complainant were generally biased against the group sharing the complainant's protected status. As with statistical patterns, the Commission will in turn infer that this general bias was at work in the complainant's termination. Analyze this evidence in two steps. First, make sure that the supervisor or manager to whom the evidence applies played some role in the decision to terminate the complainant. (If he played no such role, it is obviously difficult to link his general bias to the complainant's termination.) Second, evaluate the evidence to determine whether the claimed events (the remarks, harassment, etc.) really occurred

and whether they do in fact show general bias against the complainant's protected group.

I. Other relevant questions?

Always ask whether kinds of evidence other than those discussed above would be relevant to the Issue question. Two examples:

1. Other Kinds of Disparate Treatment

Under relevant question D above, we saw that differences in the respondent's application of the pre-termination disciplinary procedures to the complainant and others could show bias in the complainant's ultimate termination. Differences in still other aspects of the complainant's treatment before the actual termination could show bias in exactly the same way. For example, if the complainant was denied pay or benefits or forcibly transferred while others similarly situated were not, the inference that the ultimate termination was caused by the complainant's protected status would be bolstered. Where disparate treatment of this kind is present, you may well have chosen to analyze it separately under a separate sub-Issue question (see Chapter III, subsection B.4.a. If so, you can also incorporate it under the sub-Issue question dealing with the termination itself by simply writing a relevant question and referring to the discussion of the evidence under the other sub-Issue question.

2. Subjective Standards

If the "non-discriminatory factors" on which the respondent claims to have based its decision to terminate the complainant are vague and subjective (e.g., "lack of initiative," "unaggressive," "not management material"), the Commission has indicated that it will be more likely to find that the termination was biased. This is because such factors do not adequately protect against the potentially discriminatory motives of the supervisors making the termination decision, particularly where these supervisors do not share the complainant's protected status.

Where you do decide that an additional segment of evidence is relevant to the Issue question, remember to write an appropriate relevant question that reflects that particular evidence. Do not simply repeat the language of relevant question I above, since that is only a reminder for you to go beyond this list of "typical" questions.

C. The Law: Sources of the Legal Standards for Termination Cases

1. Statute

FEHA (Government Code) Section 12940(a)

2. Precedential Decisions

a. "Causal Connection" Cases:

DFEP v. Ametek, Pacific Extrusion Division (Guerra) FEHC Dec. No. 80-11. Physical handicap (congenital anomaly of spine) - termination (racker-laborer). Complainant terminated for falsifying application inquiries regarding physical handicap; danger to self and others.

DFEH v. Ambylou Enterprises, Inc. (Wilson) FEHC Dec. No. 82-06. Sex (female) - conditional sexual harassment and termination (assistant controller). Agent/employer harassment demonstrated by similar pattern and hearsay witnesses; termination immediately followed rejection of advances and complaint to supervisor.

DFEH v. C. E. Miller Corp; KTI - Miller, Inc.; and KTI Engineers and Construction, Inc. (McBride) FEHC Dec. No. 84-02. Race (Black) - termination (welding supervisor). Causal nexus demonstrated by: 1) unreasonable application of subjective standards; 2) racial epithets by decision-maker; 3) contradictory reasons for termination. Liability of successor employer.

DFEH v. Church's Fried Chicken (Jackson) FEHC Dec. No. 90-11. Race (Black) - termination (senior manager). Direct evidence of decision-maker's hostility toward Blacks; different treatment of Black employees. Reiteration of proof standards and Commission's analytical framework.

b. Termination Cases:

DFEP v. City of San Francisco (Amin) FEHC Dec. No. 78-10. National origin (India) - termination (assistant city planner). Violation demonstrated by: 1) record of satisfactory performance; 2) Respondent's inability to substantiate claim that Complainant had a language barrier.

DFEP v. Crown Zellerbach (Hardeman) FEHC Dec. No. 79-12. Race (Black) - termination (forklift driver). Evidence supported claim that Complainant terminated for insubordination; use of statistics as context for other evidence.

DFEH v. Lucky Stores (Turner) FEHC Dec. No. 80-30. Sex (female) - failure to promote and termination (audio sales manager). Totality of circumstances demonstrated sex inference (small number of female managers, sex-biased comments by decision-maker, subjective termination procedures).

DFEH v. Hubacher Cadillac/Saab, Inc. (Kendall) FEHC Dec. No. 81-01. Sex (female) - work environment sexual harassment, terms and conditions, termination (carhop). Supervisor's animus toward

females; retaliatory termination for rejecting supervisor's advances.

DFEH v. San Mateo County, Sheriff's Office (Donovan) FEHC Dec. No. 82-16. Sex (female) - termination (probationary deputy sheriff). Female deputy sheriffs held to stricter performance standards than male employees.

DFEH v. San Francisco Municipal Railway (Eskridge) FEHC Dec. No. 82-23. Race (Black) - termination (automotive service worker). Comparative data demonstrated racial inference; statistics showed Black termination rate disproportionately high.

DFEH v. Donald Shriver, Inc. (Ehlers) FEHC Dec. No. 84-07 (91-11; Order Modifying Decision Upon Remand 5/28/91). Sex (female) - work environment sexual harassment by supervisor, termination for resisting and objecting. Threats that Complainant would "pay" if she rejected advances; timing of termination.

DFEH v. Bee Hive Answering Service, A Partnership and Bill Graham (Dowing) FEHC Dec. No. 84-16. Sex (female) - work environment sexual harassment, longer hours and added duties, termination (general manager). Definition of "agent-employer;" timing of termination.

DFEH v. Smitty's Coffee Shop and Henry Woo, Owner (Hunt) FEHC Dec. No. 84-25. Age (59) - termination (waitress). Age need only be a "factor;" stated preference for younger waitresses and termination of almost all waitresses over 40.

DFEH v. Centennial Bank (Levine) FEHC Dec. No. 87-03. Religion (Jewish) - failure to accommodate and termination (loan operations manager). Comparative data refuted Respondent's "insubordination" claim.

3. Court Decisions on Commission Cases

Donald Shriver, Inc. v. Fair Employment and Housing Commission; (1986) 195 Cal.App.3d 1507 (decision affirmed in part and reversed in part).

Church's Fried Chicken v. Fair Employment and Housing Commission; Unpublished decision of California Court of Appeals (1990). Eliminated compensatory damage award.

Donald Shriver, Inc. v. Fair Employment and Housing Commission (4/26/91). Los Angeles Superior Court granted the respondent's writ of mandate setting aside the compensatory and punitive damages award contained in FEHC Dec. No. 84-07. FEHC issued Order Modifying Decision Upon Remand (5/28/91).